Supreme Court, U.S.
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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

LASHAWN LOWELL BANKS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether law enforcement officers executing a warrant to search for illegal drugs violated the Fourth Amendment and 18 U.S.C. 3109, thereby requiring suppression of evidence, when they forcibly entered a small apartment in the middle of the afternoon 15-20 seconds after knocking and announcing their presence.

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The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-19a) is reported at 282 F.3d 699. The district court's order denying respondent's motion to suppress (App., *infra*, 20a-21a) and the recommendation and report of the magistrate judge recommending against suppression (*id.* at 22a-32a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 2002. A petition for rehearing was denied on May 24, 2002 (App., *infra*, 33a-34a). On August 14,

2002, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including September 21, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 3109 of Title 18 of the United States Code provides:

> **Breaking doors or windows for entry or exit**
>
> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

STATEMENT

Respondent was charged with possession of a controlled substance with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and with possession of a firearm as an unlawful drug user, in violation of 18 U.S.C. 922(g)(3). After the district court denied his

motion to suppress evidence, he pleaded guilty to both counts, reserving the right to appeal the denial of his suppression motion. The court of appeals reversed and remanded the case to the district court, holding that law enforcement officers violated the Fourth Amendment and 18 U.S.C. 3109 by waiting only 15-20 seconds, after knocking and announcing their presence, before forcibly entering respondent's apartment. App., *infra*, 1a-3a, 22a.

1. On Wednesday, July 15, 1998, at approximately 2 p.m., officers from the Las Vegas Police Department and the FBI executed a search warrant for cocaine and drug paraphernalia at respondent's apartment in North Las Vegas, Nevada. App., *infra*, 2a, 25a-26a. The search warrant was based on information, corroborated by a controlled buy, that respondent was selling cocaine at his apartment. The officers knew the apartment to be a small, two-bedroom unit. *Id.* at 14a. They first positioned themselves at the front and rear of the apartment and then loudly knocked on the front door and announced "police search warrant." *Id.* at 2a; see 18 U.S.C. 3109. The knock and announcement were loud enough to be heard by the officers positioned at the rear of the apartment. App., *infra*, 14a. The officers waited 15-20 seconds and, hearing no response, forcibly entered the apartment using a battering ram on the front door. Respondent claimed that he did not hear the officers knock and announce because he was in the shower, but he did hear the forcible entry. The officers discovered him standing outside the bathroom, having just emerged from the shower. *Id.* at 26a.

The search of the apartment turned up a .40 caliber semi-automatic pistol, a .380 caliber semi-automatic pistol with a laser sight and seven rounds in the magazine, a .22 caliber Beretta pistol, a bullet-proof vest,

rock and crack cocaine, and a scale. Respondent was charged with possession of a controlled substance with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and possession of a firearm as an unlawful drug user, in violation of 18 U.S.C. 922(g)(3). Indictment 2. He moved to suppress evidence, arguing, *inter alia*, that the officers violated the Fourth Amendment and 18 U.S.C. 3109 by failing to follow appropriate knock-and-announce procedures. See App., *infra*, 23a.[1] After the district court denied the motion, respondent pleaded guilty to both counts, reserving his right to appeal the denial of his suppression motion. *Id.* at 1a.

2. a. A divided panel of the court of appeals reversed the district court's denial of respondent's motion to suppress.[2] The majority held that the officers, having knocked and announced and received no response, failed to wait a reasonable amount of time before forcibly entering the apartment, thereby rendering the search unconstitutional and in violation of 18 U.S.C. 3109. App., *infra*, 4a, 7a-8a.

The majority set forth four categories of knock-and-announce cases, each requiring a different lapse of time before an officer may enter a residence after knocking and announcing and receiving no response:

> (1) entries in which exigent circumstances exist and non-forcible entry is possible, permitting entry to be made simultaneously with or shortly after

[1] In support of his motion to suppress, respondent also raised claims under the Fifth and Sixth Amendments. Those claims were rejected by the courts below, see App., *infra*, 8a-11a, and are not at issue in this petition.

[2] The majority opinion was written by Judge Henry A. Politz, then a senior Fifth Circuit judge sitting by designation, and was joined by Judge William A. Fletcher.

> announcement; (2) entries in which exigent circumstances exist and forced entry by destruction of property is required, necessitating more specific inferences of exigency; (3) entries in which no exigent circumstances exist and non-forcible entry is possible, requiring an explicit refusal of admittance or a lapse of a significant amount of time; and (4) entries in which no exigent circumstances exist and forced entry by destruction of property is required, mandating an explicit refusal of admittance or a lapse of an even more substantial amount of time.

App., *infra*, 5a-6a. Thus, under the majority's scheme, whether officers have waited a sufficient period of time before entering turns on two factors: (1) whether the entry was forcible and thus involved the destruction of property, and (2) whether exigent circumstances existed. *Ibid.* The majority concluded that no exigency was present in this case, thus placing the entry in the fourth category (forcible entry with no exigency), which requires the maximum period of delay. *Id.* at 6a.

The majority next articulated a non-exhaustive list of factors to be considered in assessing the reasonableness of an officer's waiting period once the proper entry category has been determined. Those factors include:

> (a) size of the residence; (b) location of the residence; (c) location of the officers in relation to the main living or sleeping areas of the residence; (d) time of day; (e) nature of the suspected offense; (f) evidence demonstrating the suspect's guilt; (g) suspect's prior convictions and, if any, the type of offense for which he was convicted; and (h) any other observations triggering the senses of the

officers that reasonably would lead one to believe that immediate entry was necessary.

App., *infra*, 6a-7a. The majority noted that sound traveled easily through respondent's small apartment, and that the officers heard no sound coming from the unit that suggested that an occupant was moving away from the door or doing anything else that would indicate a refusal of entry. As noted above, the majority concluded that no exigency existed. For those reasons, the majority held that a 15-20 second delay after knocking and announcing was not "sufficient in duration to satisfy the constitutional safeguards." *Id.* at 8a. The majority did not indicate how much additional delay before entering was necessary to satisfy the Fourth Amendment.

b. Judge Fisher dissented, concluding that the majority had neglected its own list of factors. In particular, he emphasized that the apartment was small, the search was executed in the middle of the afternoon, the officers had strong evidence of drug dealing (including a controlled buy establishing that respondent was selling drugs out of his apartment), and the officers could reasonably have been concerned about the destruction of evidence. App., *infra*, 14a. Under those circumstances, Judge Fisher concluded, a 15-20 second delay was sufficient. *Id.* at 15a. He further stressed that the majority's opinion provided no meaningful guidance to law enforcement officers. And he pointed out that because respondent was in the shower and did not hear the officers knock and announce, additional delay before entry would have made no difference in how the events unfolded. *Id.* at 16a. Finally, Judge Fisher emphasized that the majority opinion conflicted with the decisions of several other courts of appeals,

which have held that a 15-20 second (or shorter) delay before entering was reasonable under similar circumstances. *Id.* at 16a-18a.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision creates a complex, four-part matrix for determining how long officers must wait, after knocking and announcing their presence and hearing no response, before they may enter a residence to execute a valid search warrant. That rigid, categorical approach is inconsistent with this Court's long-standing recognition that the Fourth Amendment does not "mandate a rigid rule of announcement," *Wilson* v. *Arkansas*, 514 U.S. 927, 934 (1995), and that the "general touchstone of reasonableness * * * governs the method of execution of the warrant." *United States* v. *Ramirez*, 523 U.S. 65, 71 (1998). In addition, by making the amount of time that officers must wait vary according to whether execution of a warrant requires property damage, the court of appeals' approach disregards this Court's holding in *Ramirez* that the reasonableness of a no-knock entry does not depend on whether property must be damaged. *Ibid.*

The Ninth Circuit's decision in this case conflicts with the holdings of numerous other courts of appeals that have upheld forcible entries in similar factual circumstances. Even where officers have had less specific reasons for making a forced entry than those in this case, courts have routinely upheld forcible entries involving significantly shorter delays than the 15-20 seconds at issue here.

The court of appeals' decision also creates significant uncertainty—and needless and potentially dangerous delays—in a recurring aspect of police practice. By supplanting the general reasonableness standard gov-

erning the execution of warrants with an amorphous and unworkable categorical scheme, the court has left law enforcement officers in the Ninth Circuit with no meaningful guidance on how much delay after knocking and announcing is required by the Fourth Amendment. The court of appeals' holding is particularly problematic in this regard because the facts of this case clearly justified a prompt entry and because, as the dissent below emphasized, the events would not have unfolded any differently had the officers waited longer before entering. For those reasons, the court of appeals' decision threatens to frustrate the safe and effective performance of front-line law enforcement duties. This Court's review is therefore warranted.

A. The Court Of Appeals' Decision Is Inconsistent With This Court's Precedent

1. The complex and confusing categorical scheme adopted by the court of appeals is inconsistent with the general reasonableness standard mandated by this Court's cases. The court's rigid, four-part matrix cannot be reconciled with this Court's insistence that the "general touchstone of reasonableness which governs Fourth Amendment analysis * * * governs the method of execution of the warrant." *Ramirez*, 523 U.S. at 71; see *Wilson*, 514 U.S. at 934 (stating Fourth Amendment does not "mandate a rigid rule of announcement that ignores countervailing law enforcement interests"); *Richards* v. *Wisconsin*, 520 U.S. 385, 387 (1997) (same). As was the case in *United States* v. *Arvizu*, 122 S. Ct. 744, 750-751 (2002), where this Court reversed a similarly flawed Fourth Amendment standard created by the Ninth Circuit, the approach taken by the court of appeals in this case imposes an

artificial set of categories on the Fourth Amendment's general requirement of reasonableness.

Under an analysis for reasonableness, officers may almost always conclude that they have effectively been refused admittance, thus justifying a forcible entry, when 15-20 seconds have elapsed after knocking and announcing their presence. Indeed, a shorter period of delay is generally reasonable when officers are executing a warrant to search for drugs, where the object of the search is subject to easy destruction and where violent armed responses are common. Officers need not let a prolonged delay frustrate the purpose of the search or expose them to undue danger.

The court of appeals' categorical approach disregards the realities confronting officers executing warrants. A prime example is the court's rule that, while non-exigent entries that can be accomplished without force require "a lapse of a significant amount of time," all "entries in which no exigent circumstances exist and forced entry by destruction of property is required, mandat[e] an *explicit refusal* of admittance or *a lapse of an even more substantial amount of time*." App., *infra*, 5a-6a (emphasis added). Taking that rule at face value, it appears that the court of appeals would require officers faced with a visibly barricaded door but no exigent circumstances either to receive express refusal of admittance or to delay "an even more substantial amount of time" before attempting to enter the premises. But in such circumstances, the barricaded door, which will have to be damaged to permit entry, itself may support the officers' conclusion that their admittance had been *constructively* denied or that prompt entry was reasonable.

Likewise, absent exigent circumstances, that same rule would appear to require officers executing a search

warrant at a residence they knew to be locked and empty to go through the ritual of knocking and announcing at the empty building and then waiting "an even more substantial amount of time" before forcibly entering. Such a result is contrary to the settled proposition that the knock-and-announce requirement does not compel officers to engage in "senseless ceremon[ies]," *Wilson*, 514 U.S. at 936, including knocking and announcing where doing so would be "futile." *Richards*, 520 U.S. at 394.

2. The categorical test articulated by the court of appeals is flawed in another critical respect. The test makes the need to destroy property a pivotal factor in deciding how long officers must wait, after knocking and announcing, before entering a residence to execute a search warrant. Indeed, under the court of appeals' approach, the need to destroy property becomes the first and primary inquiry. The court stated that, as an initial matter, "we categorize entries as either forced or non-forced" based upon the need to damage property to effectuate the entry. App., *infra*, 6a. After that inquiry, "[t]he reasonableness must *then* be determined in light of the totality of the circumstances surrounding the execution of the warrant." *Ibid.* (emphasis added). But this Court's decision in *Ramirez* demonstrates that the focus on the destruction of property in determining the timing of an entry is misplaced.

In *Ramirez*, the Ninth Circuit had held that when an officer executes a warrant by entering a residence without knocking and announcing, "more specific inferences of exigency are necessary" to justify the entry if property will be destroyed than if property will not be destroyed. 523 U.S. at 70 (quoting *United States* v. *Ramirez*, 91 F.3d 1297, 1301 (1996)). This Court rejected that proposition, stating that "a no-knock entry

is justified if police have a 'reasonable suspicion' that knocking and announcing would be dangerous, futile, or destructive to the purposes of the investigation. Whether such a 'reasonable suspicion' exists depends in no way on whether police must destroy property in order to enter." *Id.* at 71.

Although *Ramirez* involved a no-knock entry, its reasoning is equally applicable here. *Ramirez* reflects a general principle that the need to damage property in order to effectuate an entry to execute a search warrant should not be part of the analysis of determining whether the entry itself was reasonable.[3] Rather, the dispositive issues in evaluating the timing of an entry are whether admittance has been effectively refused and whether other law enforcement needs render prompt entry reasonable. Cf. *United States* v. *Knapp*, 1 F.3d 1026, 1030 (10th Cir. 1993) (observing that where no exigent circumstances permitted officers to disregard knock-and-announce requirement, "the critical issue is whether the officers were constructively refused admittance under § 3109 by waiting ten to twelve seconds without receiving a response."). Thus, the proper analysis focuses on how long a reasonable officer would wait before concluding that continued delay would be futile, risk frustrating the purposes of the warrant, or expose persons to serious danger. Cf. *Richards*, 520 U.S. at 394. Property destruction is a

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[3] That is not to suggest that "[e]xcessive or unnecessary destruction of property" does not trigger Fourth Amendment concerns. *Ramirez*, 523 U.S. at 71. But here, there does not appear to have been any more damage to respondent's property than was required to enter his apartment. And, in any event, excessive damage to property would not support the suppression of evidence. *Ibid.*

necessary consequence of the resident's failure to open the door; it is not a factor that requires additional delay.

Because, as *Ramirez* holds, the lawfulness of the entry does not depend on whether property must be destroyed even where officers executing a warrant must make a special showing of "reasonable suspicion" to justify a no-knock entry, it follows that the prospect of property destruction does not require additional delay in the circumstances presented here. The court of appeals, however, without even mentioning *Ramirez*, engrafted a rigid property-destruction principle onto the knock-and-announce requirement of the Fourth Amendment and 18 U.S.C. 3109. That aspect of the court's holding alone justifies this Court's review.

B. The Decision Below Conflicts With Decisions Of Other Courts Of Appeals

The court of appeals' holding also directly conflicts with the decisions of numerous other circuit courts, which have upheld forcible entries involving comparable (or shorter) delays in similar (or less compelling) factual circumstances. Here, the officers were executing a valid warrant for drugs during the middle of the afternoon at an apartment that they knew to be quite small and that they had probable cause to believe contained readily disposable drugs. They also knew that respondent was selling cocaine at his apartment. App., *infra*, 14a. The court of appeals' holding that the delay under these circumstances was too short and therefore violated the Fourth Amendment and 18 U.S.C. 3109 is unprecedented. As the discussion below demonstrates, there is little doubt that the instant entry would have been upheld in many other circuits.

In *United States* v. *Lucht*, 18 F.3d 541, 548-549 (8th Cir.), cert. denied, 513 U.S. 949 (1994), for example, the

court of appeals upheld the district court's finding that law enforcement officers acted reasonably when they attempted to execute a warrant to search for methamphetamine at 7 a.m. by knocking and announcing and waiting approximately 20 seconds before forcibly entering the premises. The court explained:

> [T]he [district] court found that [the defendants'] houses were small, the occupants were awake, there was probable cause to believe [the defendants] possessed narcotics, and the officers waited twenty seconds for a response after knocking and announcing their presence and purpose. In these circumstances, the possibility was slight that those within did not hear or could not have responded promptly, if in fact they had desired to do so.

Id. at 549. Thus, the Eighth Circuit found no knock-and-announce violation when officers waited for essentially the same period as at issue here, but where the residence was larger and the forcible entry took place early in the morning, when residents are more likely to be asleep or in the shower, rather than in the middle of a weekday afternoon, as in this case.

Similarly, in *United States* v. *Spriggs*, 996 F.2d 320, cert. denied, 510 U.S. 938 (1993), the D.C. Circuit upheld the district court's denial of the defendant's motion to suppress heroin, cash, and drug paraphernalia seized from his apartment during a search that was conducted between 7:30 and 7:45 on a weekday morning. Law enforcement officers forced open the front door of the apartment after waiting approximately 15 seconds. In those circumstances, the court held that "the agents were justified in concluding that they had been constructively refused admittance when the occupants failed to respond within 15 seconds of their announce-

ment." *Id.* at 323; see *United States* v. *Jones*, 133 F.3d 358, 361-362 (5th Cir.) (noting that courts have generally found no violation "when officers have waited more than 5 seconds," and holding that "[i]n drug cases, where drug traffickers may so easily and quickly destroy the evidence of their illegal enterprise by simply flushing it down the drain, 15 to 20 seconds is certainly long enough for officers to wait before assuming the worst and making a forced entry."), cert. denied, 523 U.S. 1144 (1998).

Numerous other decisions have upheld delays of 15-20 seconds (or less) in generally similar factual circumstances. See, *e.g.*, *United States* v. *Garcia*, 983 F.2d 1160, 1168 (1st Cir. 1993) (holding that "a wait of ten seconds after knocking combined with an announcement before forced entry, was reasonable" because "[t]he occupants of the apartment were reasonably believed to possess cocaine, a substance that is easily and quickly hidden or destroyed"); *United States* v. *Gatewood*, 60 F.3d 248, 250 (6th Cir.) (concluding that delay of approximately ten seconds was sufficient before entering apartment officers knew to contain cocaine), cert. denied, 516 U.S. 1001 (1995); *United States* v. *Markling*, 7 F.3d 1309, 1318 (7th Cir. 1993) (holding that delay of seven seconds was sufficient before forcing entry where "[t]here was no noise coming from the apartment * * * that would have made it difficult for [defendant] to hear" the officers' announcement, the "motel room was small," and informants indicated that defendant "was likely to flush the cocaine * * * down the toilet."); *United States* v. *Goodson*, 165 F.3d 610, 612, 614 (8th Cir.) (holding that delay of 14-20 seconds before forcing entry did not violate Fourth Amendment where officers searched one-story ranch house for crack cocaine at 1:44 a.m.), cert. denied, 527

U.S. 1030 (1999); *United States* v. *Jenkins*, 175 F.3d 1208, 1215 (10th Cir.) (upholding delay of 14-20 seconds before forcing entry where search of defendant's residence took place at 10 a.m.), cert. denied, 528 U.S. 913 (1999). While complete uniformity cannot be expected on such a fact-sensitive question as the reasonableness of a delay before forcing entry, the Ninth Circuit's approach is significantly out of step with that of other circuits. This Court's review is warranted to resolve the conflict created by this decision.

C. The Court Of Appeals' Suppression Of Evidence Imposes Unjustified Costs On Society

The court of appeals' decision is problematic in an additional respect. As the dissent below emphasized (App., *infra*, 14a), it is clear under the facts of this case that the events would not have unfolded any differently had the officers waited longer before entering. It is undisputed that respondent was in the process of showering when the officers knocked at his door and that he claims that, for this reason, he did not hear the officers knock and announce. Accordingly, even if the officers had waited longer or knocked again before entering, respondent still would not have heard them and so still would not have admitted them to execute the warrant. And because the officers would thus have forcibly entered respondent's apartment and obtained the same evidence under the warrant-authorized search regardless of the violation found by the court of appeals, that supposed violation did not in any way harm respondent's property or privacy interests.

Nevertheless, the court of appeals accepted respondent's contention that "all evidence, including [respondent's] statements, constitute fruits of an illegal search and should be suppressed." App., *infra*, 4a. But the

suppression of "all evidence" on the basis of a supposed knock-and-announce violation that does no concrete harm to a defendant's constitutionally protected interests constitutes a disproportionate sanction against the government. See *United States* v. *Espinoza*, 256 F.3d 718, 725 (7th Cir. 2001) ("[T]he principle of proportionality demands that the application of the exclusionary rule should be limited only to those instances where the constitutional violation has caused actual harm to the interest * * * that the rights protect."), cert. denied, 122 S. Ct. 905 (2002); *id.* at 726 ("The exclusion of probative evidence is too disproportionately severe a remedy where the Fourth Amendment violation has not harmed the particular interest protected by the constitutional requirement at issue."); see also *United States* v. *Stefonek*, 179 F.3d 1030, 1035 (7th Cir. 1999) ("[T]here must be a causal relation between the violation of the Fourth Amendment and the invasion of the defendant's interests for him to be entitled to the remedy of exclusion."); *ibid.* ("[T]he violation of the Fourth Amendment in this case did no harm to any of the interests that the amendment protects, so that exclusion of the evidence seized under the warrant would be a disproportionate sanction."), cert. denied, 528 U.S. 1162 (2000). As this Court explained in *Nix* v. *Williams*, 467 U.S. 431, 443 (1984), "the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred." See *Segura* v. *United States*, 468 U.S. 796, 814 (1984) (rejecting suppression based on allegedly illegal entry because "[h]ad police never entered the apartment, but instead conducted a perimeter stakeout

to prevent anyone from entering the apartment and destroying evidence, the contraband now challenged would have been discovered and seized precisely as it was here"). Where, as in this case, there is no harm to a defendant's interests protected by the knock-and-announce requirement, society's vital interests in combating crime—in particular the scourge of drug trafficking and related violence—should not be sacrificed by application of the exclusionary rule.

D. The Court of Appeals' Decision Creates Significant Uncertainty In A Recurring Aspect Of Police Activity

In addition to the conflicts it creates with the decisions of this Court and other courts of appeals, the Ninth Circuit's categorical test warrants review because it is incapable of predictable application by either officers in the field or courts—especially in view of the result reached in this case. Absent exigent circumstances, the court of appeals would require "a lapse of a significant amount of time" before making a *non-forcible* entry. App., *infra*, 5a. Where no exigency is present and a *forced* entry is necessary, the court of appeals would require "an even more substantial amount of time" before forcing entry. *Id.* at 6a. Those generalities are insufficient to provide meaningful guidance to officers engaged in the dangerous business of executing search warrants.

This case illustrates the point. Here, the officers waited 15-20 seconds after knocking and announcing to execute a warrant to search for drug evidence, evidence that is easy to dispose of or destroy. Although the court made clear that a 15-20 second delay is, in its view, plainly insufficient, it did not give any indication of how much more delay was necessary, or how the officers were supposed to know the amount of delay

that would be acceptable under the court's approach. Further, the court of appeals did not adequately explain why 15-20 seconds with no response does not support a reasonable concern that respondent might be quietly seeking to destroy the evidence by, for example, flushing the drugs down the toilet.

If 15-20 seconds is not enough delay here—where the warrant was for easily disposable drugs, the officers had strong evidence that drugs are routinely sold from respondent's premises, the search occurred in the daytime, and the apartment was so small that the bathroom was only a few steps away from any part of the premises—then it would seem to be a very rare case in which such a delay could ever be sufficient. The court of appeals' approach thus threatens to complicate and confuse the process of executing search warrants, and to subject law enforcement personnel to unnecessary, and unacceptable, risks in the process.

Fourth Amendment rules that are unduly complicated cannot give officers the guidance needed to make difficult on-the-spot judgments in the heat of the moment. Other courts have recognized that delays of 15-20 seconds after knocking and announcing are sufficient to make a forced entry reasonable; in the Ninth Circuit, officers must now pause to make assessments of how much property must be destroyed to effect an entry, and how specific are the exigencies that prompt the entry. Even then, the officers have no guidance about how much longer they must wait in a case like this. Because that approach departs from this Court's cases and frustrates effective law enforcement, the conflict created by the decision below should be resolved by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2002

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-10439

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

LASHAWN LOWELL BANKS, DEFENDANT-APPELLANT

Argued and Submitted Sept. 10, 2001
Filed March 5, 2002

Before: POLITZ,* W. FLETCHER, and FISHER, Circuit Judges.

Opinion by Judge POLITZ; Partial Concurrence and Partial Dissent by Judge FISHER.

POLITZ, Circuit Judge.

Lashawn Lowell Banks appeals his guilty plea conviction for possession of a controlled substance with intent to distribute, and for being a drug user in possession of a firearm. His plea followed the district court's denial of his motion to suppress certain evidence. Banks reserved his right to appeal. A close review of

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* Honorable Henry A. Politz, Senior United States Circuit Judge for the Fifth Circuit Court of Appeals, sitting by designation.

the record, counsel's arguments, and guiding principles, persuades us that a reversal and remand is in order.

BACKGROUND

The present action concerns the execution of a search warrant on Banks' apartment by North Las Vegas Police Department officers and FBI agents. The officers positioned themselves at the front and rear of the apartment and followed the statutory "knock and announce" procedure by knocking loudly on the apartment door and announcing "police search warrant." *See* 18 U.S.C. § 3109. After fifteen to twenty seconds without a response, armed SWAT officers made a forced entry into Banks' apartment.

Once inside, the officers found Banks in the hallway outside his bathroom. Banks, who obviously had just emerged from his shower, was forced to the floor and handcuffed. He then was seated at his kitchen table for questioning and shortly thereafter was provided underwear with which to cover himself. Two agents questioned Banks while other officers searched his apartment. Banks maintains that he was under the influence of drugs and alcohol during the interrogation. Both agents, however, testified that they perceived no indications that Banks was under the influence. Banks also asserts that he was nervous and intimidated by a "good-cop versus bad-cop" routine utilized by the interrogating agents and the hooded SWAT officers searching the apartment. The interrogating agents maintain that Banks appeared calm and was able to reason throughout the interview.

The agents questioned Banks for approximately forty-five minutes, and about midway thereof asked Banks to reveal his suppliers. Banks stated that he

would not reveal his suppliers before talking to an attorney. The agents continued the questioning.

Prior to trial Banks moved to suppress the statements he made during the interrogation. He contends that the statements should have been suppressed on the grounds that they were obtained: (a) in violation of 18 U.S.C. § 3109 because the officers failed to wait a reasonable period of time before forcefully entering his residence when executing the search warrant; (b) in violation of the fifth amendment because he did not make a knowing and voluntary waiver of his rights during the interrogation; and (c) in violation of the fifth amendment because the interrogation continued after he made an unequivocal request for an attorney. The district court denied the suppression motion. Following this denial, Banks pled guilty to possession of a controlled substance with intent to distribute and to being a drug user in possession of a firearm.

Banks expressly reserved his right to appeal the court's denial of his Motion to Suppress. This appeal followed.

ANALYSIS

I. 18 U.S.C. § 3109

We review a trial court's legal conclusions *de novo*, reviewing findings of fact underlying those conclusions for clear error.[1]

Title 18 U.S.C. § 3109, commonly referred to as the "knock and announce" statute, establishes guidelines

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[1] *United States v. Granville*, 222 F.3d 1214, 1217 (9th Cir. 2000) (noting that legal conclusion that "knock and announce" statute was violated is reviewed *de novo*, while findings regarding facts underlying the conclusion are reviewed for clear error).

for federal law enforcement officers when executing a search warrant. The statute directs that:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

18 U.S.C. § 3109.

Under the facts at bar this statute raises two critical issues: (a) whether the officers provided notice of their authority and purpose; and (b) whether they were refused admittance. There is no dispute that proper notice of authority and purpose was given herein. Before us is the second issue, refusal of admittance.

Banks contends that the officers executing the search warrant entered his apartment illegally because they failed to wait a reasonable time, after receiving no response, before forcefully entering his quarters. Banks further contends that because the entry was in violation of his fourth amendment rights and 18 U.S.C. § 3109, all evidence, including his statements, constitute fruits of an illegal search and should be suppressed. We find this contention persuasive.

A literal application of the statute would allow entry only after both announcement and specific denial of admittance. Our precedents, however, dictate that an affirmative refusal of entry is not required by the statute, and that refusal may be implied in some instances. *See, e.g., United States v. Allende*, 486 F.2d 1351, 1353 (9th Cir. 1973). "A failure to answer a knock and announcement has long been equated with a refusal

to admit the search party and a justification for forcible entry." *United States v. Ramos*, 923 F.2d 1346, 1356 (9th Cir. 1991) overruled on other grounds by *United States v. Ruiz*, 257 F.3d 1030 (9th Cir. 2001) (citations omitted). Furthermore, "[t]here are no set rules as to the time an officer must wait before using force to enter a house; the answer will depend on the circumstances of each case."[2]

Section 3109 serves the following interests: (a) reducing the risk of harm to both the officer and the occupants of the house to be entered; (b) helping to prevent the unnecessary destruction of private property; and (c) symbolizing respect for individual privacy summarized in the adage that "a man's house is his castle." *United States v. Bustamante-Gamez*, 488 F.2d 4, 9 (9th Cir. 1973) (quoting *Miller v. United States*, 357 U.S. 301, 307, 78 S. Ct. 1190, 2 L. Ed. 2d 1332 (1958)).

Entries may be classified into four basic categories, consistent with the interests served by 18 U.S.C. § 3109: (1) entries in which exigent circumstances exist and non-forcible entry is possible, permitting entry to be made simultaneously with or shortly after announcement; (2) entries in which exigent circumstances exist and forced entry by destruction of property is required, necessitating more specific inferences of exigency; (3) entries in which no exigent circumstances exist and non-forcible entry is possible, requiring an explicit refusal of admittance or a lapse of a significant amount of time; and (4) entries in which no exigent circumstances exist and forced entry by destruction of property is required, mandating an explicit refusal of admittance or

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[2] *McClure v. United States*, 332 F.2d 19, 22 (9th Cir. 1964), *cert. denied*, 380 U.S. 945, 85 S. Ct. 1027, 13 L. Ed. 2d 963 (1965).

a lapse of an even more substantial amount of time. *Id.* at 12. The action at bar falls into the final category because no exigent circumstances existed[3] and the entry required destruction of property—i.e., the door to Banks' apartment.

Consideration of the foregoing categories aids in the resolution of the essential question whether the entry made herein was reasonable under the circumstances. In addressing that inquiry, we categorize entries as either forced or non-forced. The reasonableness must then be determined in light of the totality of the circumstances surrounding the execution of the warrant, particularly considering the duration of the officers' pause before making a forced entry after the required knock and announcement.

Our task is to determine what constitutes a reasonable waiting period before officers may infer that they have been denied admittance. In assessing the reasonableness of the duration of the officers' wait, we review all factors that an officer reasonably should consider in making the decision to enter without an affirmative denial. Those factors include, but are not limited to: (a) size of the residence; (b) location of the residence; (c) location of the officers in relation to the main living or sleeping areas of the residence; (d) time of day; (e) nature of the suspected offense; (f) evidence demonstrating the suspect's guilt; (g) suspect's prior

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[3] This court reviews the mixed question of law and fact as to whether exigent circumstances exist *de novo*. *United States v. McConney*, 728 F.2d 1195, 1204-05 (9th Cir. 1984) (en banc). Exigent circumstances exist when "there [is] a likelihood that the occupants [will] attempt to escape, resist, destroy evidence, or harm someone within. . . ." *Id.* at 1205. No such evidence was presented in this case.

convictions and, if any, the type of offense for which he was convicted; and (h) any other observations triggering the senses of the officers that reasonably would lead one to believe that immediate entry was necessary.

In the case before us, the officers knocked once and announced their purpose. The officers heard no sound coming from the small apartment that suggested that an occupant was moving away from the door, or doing anything else that would suggest a refusal of admittance. We know from the record that sounds were transmitted relatively easily, for Officer Tomasso, waiting outside at the rear of the apartment, heard Officer Crespo's knock at the front door. Yet none of the officers testified that they heard any sound coming from within the apartment. There was nothing else that triggered the officers' senses, and there were no exigent circumstances warranting a waiver of the reasonable delay. The officers had no specific knowledge of any facts or reasonable expectations from which they could reasonably have believed that entry into Banks' residence would pose any risk greater than the ordinary danger of executing a search warrant on a private residence.

Because the officers were not affirmatively granted or denied permission, they were required to delay acting for a sufficient period of time before they could reasonably conclude that they impliedly had been denied admittance. After pausing a maximum of fifteen to twenty seconds, the officers forced entry. Banks came out of his shower upon hearing the sound of his door being forced open, and stumbled into the hallway concerned that his apartment was being invaded. Upon entering, the officers found Banks naked, wet, and soapy from his shower. Under these circumstances, we

are not prepared to conclude that the delay of fifteen to twenty seconds after a single knock and announcement before forced entry was, without an affirmative denial of admission or other exigent circumstances, sufficient in duration to satisfy the constitutional safeguards.

II. Banks' Fifth and Sixth Amendment Claims

As noted above, we review a trial court's legal conclusions *de novo*, and our review of findings of fact underlying those conclusions is for clear error. However, "[w]e review the district court's determination that the defendant knowingly and voluntarily waived his *Miranda* rights under the clearly erroneous standard." *United States v. Fouche*, 833 F.2d 1284, 1286 (9th Cir. 1987).

1. *The Voluntariness of Banks' Statements*

The fifth amendment states that no person "shall be compelled in any criminal case to be a witness against himself."[4] Under the teachings of *Miranda v. Arizona*,[5] to assure the meaningful protection of this fifth amendment right, a defendant subject to custodial interrogation must be advised of his "right to remain silent, that any statement he does make may be used . . . against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.* at 444, 86 S. Ct. 1602. A knowing and voluntary waiver of these rights is permissible. Such a waiver, however, must be established by a preponderance of the evidence. *Colorado v. Connelly*, 479 U.S. 157, 168-69, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986).

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[4] U.S. Const., amend. V.

[5] 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Banks contends that his statements were obtained involuntarily and through coercion in violation of his fifth amendment rights. He complains that because he was under the influence of alcohol and narcotics at the time of the interrogation, he was unable to make a knowing and voluntary waiver of his rights. He further asserts that his statements were coerced because he was terrorized by the entry of the police into his home, intimidated by officers employing the "good-cop versus bad-cop" routine, and in fear of being paraded naked around the neighborhood. Our review of the record, however, persuades us that the district court did not err in its determination that he made a knowing and voluntary waiver of these rights.

A confession made in a drug or alcohol induced state, or one that is the product of physical or psychological pressure, may be deemed voluntary if it remains "the product of a rational intellect and a free will. . . ." *Medeiros v. Shimoda*, 889 F.2d 819, 823 (9th Cir. 1989) (citations omitted). The interrogating agents testified about Banks' demeanor during the interrogation. Neither detected any indication that Banks was under the claimed adverse influence, and both described him as calm and able to reason. Similarly, the record demonstrates that Banks was able to understand the circumstances, follow instructions, and answer questions. From the record, Banks does not appear to have been "incapacitated" by his use of drugs and alcohol. During the interrogation, he answered some of the agent's questions while refusing to answer those regarding his suppliers and was able to provide officers with the combination to his safe. Prior to being taken to the police station, he requested that his girlfriend be contacted so she could secure his apartment. Because

the evidence supports the district court's conclusion that Banks' statements were the product of rational intellect and a free will, we hold that the district court did not err in finding a knowing and voluntary waiver.

2. *Banks' Right to Counsel Under* Miranda

Banks also contends that his statements were obtained in violation of his right to counsel under *Miranda*. No further questioning of a suspect may occur after he expresses the desire to consult with counsel, and police must clarify an ambiguous or equivocal request for an attorney. *Miranda*, 384 U.S. at 474, 86 S. Ct. 1602; *see also United States v. Fouche*, 833 F.2d 1284, 1287 (9th Cir. 1985), *cert. denied*, 486 U.S. 1017, 108 S. Ct. 1756, 100 L. Ed. 2d 218 (1988). Notwithstanding, "a defendant may selectively waive his *Miranda* rights, deciding to respond to some questions but not others." *Bruni v. Lewis*, 847 F.2d 561, 563 (9th Cir. 1988) (citations omitted).

In support of his claim that his right to counsel under *Miranda* was violated, Banks asserts that during the latter part of his questioning he told the agents that he wanted to consult with a lawyer about the possibility of making a "deal" in exchange for divulging information about his suppliers. The record reflects that when the agents asked Banks a question regarding his suppliers, he responded that he wanted to speak to an attorney before revealing his suppliers to see if he could secure some consideration, what one might deem a *quid pro quo*, for his cooperation with the officers. The agents reasonably understood Banks' statement to mean he

was willing to answer some questions but not others. That conclusion is fully supported by the record.[6]

The judgment is AFFIRMED in part, REVERSED in part and the matter is REMANDED for further proceedings consistent herewith.

FISHER, Circuit Judge, dissenting in part, concurring in part.

The majority rules the entry in this case unconstitutional and in violation of § 3109 because the officers delayed only 15 to 20 seconds after knocking loudly on Banks' apartment door and announcing "police search warrant." Simply put, the police should have waited longer—how much longer is not specified—before they could lawfully assume that their knock and announcement had been heard, that Banks was not going to open the door voluntarily and that they were justified in forcing the door open with a battering ram. Op. at 704. I share my colleagues' concerns that officers not peremptorily and forcibly invade the privacy of a suspect's home, and it is disquieting to visualize Banks' shock and embarrassment as he emerged naked and still soapy from his shower and confronted the officers who had just burst through his front door. *Cf. United States v. Becker*, 23 F.3d 1537, 1540 (9th Cir. 1994) ("The sanctity of a person's home, perhaps our last real retreat in this technological age, lies at the very core of the rights which animate the [fourth] amendment."). Nonetheless, although this case admittedly is a close call, I

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[6] *Fouche*, 833 F.2d at 1287 ("[I]f [a suspect] is indecisive in his request for counsel, there may be some question on whether he did or did not waive counsel . . . Situations of this kind must necessarily be left to the judgment of the interviewing Agent.") (quoting *Miranda*, 384 U.S. at 436, 86 S. Ct. 1602).

cannot agree that the officers here acted outside the limits of established case law or—more to the point—even the criteria the majority articulates. I therefore respectfully dissent from the § 3109 portion of the majority opinion (Part I). Otherwise, I concur in Part II of the opinion.

I do not think the outcome of this case can turn simply on the amount of time the officers waited after knocking. Banks did not hear the knock or announcement in the first place; thus it would have made no practical difference if the officers waited substantially longer than 15 or 20 seconds. If there was a problem of procedural or constitutional dimension, it had to be that the officers did not knock twice or engage in some other effort to determine whether Banks was home and had heard the first knock. Although hinting that was the real problem here, the majority nevertheless holds that the officers:

> were *required to delay acting* for a sufficient period of time before they could reasonably conclude that they impliedly had been denied admittance. . . .
>
> Under these circumstances, we are not prepared to conclude that the *delay* of fifteen to twenty seconds after a single knock and announcement before forced entry was, without an affirmative denial of admission or other exigent circumstances, *sufficient in duration* to satisfy the constitutional safeguards.

Op. at 704-05 (emphasis added).

In assessing whether there was a reasonable delay, the majority acknowledges that "[t]here are no set rules as to the time an officer must wait before using force to enter a house; the answer will depend on the

circumstances of each case." *McClure v. United States*, 332 F.2d 19, 22 (9th Cir. 1964); *see also United States v. Bustamante-Gamez*, 488 F.2d 4, 9 (9th Cir. 1973) ("In short, 'a claim under 18 U.S.C. § 3109 depends upon the particular circumstances surrounding the [entry].'") (quoting *Jones v. United States*, 362 U.S. 257, 272, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960)).

Nonetheless, the majority then extrapolates from *Bustamante-Gamez* four basic categories of entry, placing this case in category 4: "entries in which no exigent circumstances exist and forced entry by destruction of property is required, mandating an explicit refusal of admittance or a lapse of an even more substantial amount of time"—that is, substantially more than the "significant amount of time" required under category 3.[1] Refining its analysis further, the majority sets forth a nonexclusive list of factors "an officer reasonably should consider in making the decision to enter [forcibly] without an affirmative denial." *See* Op. at 704. The source of this list is not identified, but I have no quarrel with its substance—so long as it is not read as substituting a checklist approach to what our case law recognizes is a circumstance-specific evaluation.

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[1] I say "extrapolate" because *Bustamante-Gamez* did not explicitly identify four categories, only three—albeit not as "categories." *Bustamante-Gamez* stated: "an explicit refusal of admittance or lapse of a significant amount of time is necessary if the officers have no facts indicating exigency." 488 F.2d at 9. The majority subdivides this into separate categories, depending on whether "non-forcible entry is possible" (category 3—requiring "a lapse of a *significant* amount of time") or "forced entry by destruction of property is required" (category 4—requiring "a lapse of *an even more substantial* amount of time"). Op. at 704 (emphasis added).

Where I do disagree with the majority, however, is its application of these factors—or more to the point, its disregard or discounting of key factors present here. Among the listed factors are "(a) size of the residence"; "(c) location of the officers in relation to the main living or sleeping areas of the residence"; and "(e) nature of the suspected offense." Banks lived in a small, two-bedroom, one-bathroom apartment. The bathroom was located in the middle part of the apartment. Banks testified that, "It's not a very big apartment." And, "2 steps from the shower is—you can look left, see the door." Arriving at Banks' apartment at about 2:00 p.m., the officers positioned themselves at the front and back doors. There is no dispute that the officers gave proper notice of their authority and purpose. Officer Crespo knocked loudly on the front door and announced "police search warrant." Officer Tomasso, at the rear, testified he heard Crespo's loud knock. (The record is silent as to Tomasso's also having heard the announcement, or whether anyone heard water running or other sounds of someone taking a shower.) On these facts, the officers could reasonably have assumed Banks had heard at least the loud knock and probably the announcement.

Moreover, Banks' suspected offense was drug dealing; the warrant to search his apartment was predicated upon information, corroborated by a controlled buy, that Banks was selling cocaine at his apartment. Thus there was some basis for concern that Banks' delay in responding might be related to attempts to dispose of evidence. *See United States v. Spikes*, 158 F.3d 913, 926 (6th Cir. 1998), where the court noted that "where drug traffickers may easily and quickly destroy the evidence of their illegal enterprise by simply

flushing it down the drain, 15 to 20 seconds is certainly long enough for officers to wait before assuming the worst and making a forced entry." *Spikes* also cautioned that "[t]his reality, however, must be balanced against the fact that the simple presence of drugs alone does not justify abandoning the 'knock and announce' rule or so diluting its requirements that it becomes a meaningless gesture. . . . Thus the presence of drugs in the place to be searched, while not a conclusive factor, lessens the length of time law enforcement must ordinarily wait outside before entering a residence." *Id.* (citation omitted). *See also United States v. Jones*, 133 F.3d 358, 361-62 (5th Cir. 1998) (reviewing cases, and upholding wait of 15 to 20 seconds after knock "given the possibility that a longer wait might well have resulted in the destruction of evidence [illegal drugs]"); *United States v. Garcia*, 983 F.2d 1160, 1168 (1st Cir. 1993) (holding wait of 10 seconds after knock reasonable where occupants of apartment were believed to possess cocaine, "a substance that is easily and quickly hidden or destroyed"). *But cf. Becker*, 23 F.3d at 1541 ("[W]hile peril to officers or the possibility of destruction of evidence or escape may well demonstrate an exigency [justifying immediate entry], mere unspecific fears about those possibilities will not."); *United States v. Moreno*, 701 F.2d 815, 818 (9th Cir. 1983), *vacated on other grounds by* 469 U.S. 913, 105 S. Ct. 286, 83 L. Ed. 2d 223 (1984) ("In order to justify forced entry without an announcement of authority and refusal of admittance, there must be some evidence to support the suspicion that contraband will be destroyed."); *United States v. Fluker*, 543 F.2d 709, 717 (9th Cir. 1976) (no evidence the defendants were destroying narcotics to justify officers entering without any knock or announcement).

The majority acknowledges some of these factors in passing, but gives them little or no weight. With respect, I fail to see what guidance law enforcement should draw from such a holding that disregards some of the very factors the majority identifies as relevant. Nor do I think the majority's conclusion is warranted under these circumstances, or in light of decisions involving comparable situations where a 15 to 20 second delay has been held sufficient.

First, 15 to 20 seconds is not an insignificant amount of time to wait after a loud knock and announcement. Knock, then count out the time to see for yourself.

Second, Banks was in the shower and did not hear the knock and announcement, so even if the wait had been longer, absent another knock or announcement, he still would not have responded.

Third, although there is no Ninth Circuit precedent directly on point, our case law—albeit cautionary—and that of other circuits tends to support the entry here. We previously have held that a five second wait after three loud knocks and an announcement was not a reasonably significant amount of time to permit the defendant to determine who was at the door and to respond to the request for admittance, where the warrant was executed early in the morning and the occupants of the apartment were likely to be asleep. *United States v. Granville*, 222 F.3d 1214, 1218-19 (9th Cir. 2000). Here, however, the warrant was executed in the middle of the afternoon and there was ample time for Banks to respond to the request for admittance. The Sixth Circuit has held that "when officers execute a warrant in the middle of the day . . . the length of time the officers must tarry outside diminishes." *Spikes*, 158 F.3d at 927. Furthermore, given the small

size of Banks' apartment, there was no reason for the officers to assume Banks had not had sufficient time to hear and respond to the knock and announcement in the 15 to 20 second interval. The Eighth Circuit specifically addressed such a circumstance in *United States v. Lucht*, 18 F.3d 541 (8th Cir. 1994). There, the court concluded a 20 second wait after a knock and announcement was reasonable where the defendants' houses were small, the defendants were awake at the time and there was probable cause to believe they possessed narcotics. *Id.* at 549. "In these circumstances, the possibility was slight that those within did not hear or could not have responded promptly, if in fact they had desired to do so." *Id.* The Tenth Circuit has upheld an entry after a 10 to 12 second wait. *United States v. Knapp*, 1 F.3d 1026 (10th Cir. 1993). Because the defendant, whose presence was assumed given the illuminated lights in the house, gave no indication he intended to allow the officers into his home voluntarily, the court held, "[i]t was plausible for the officers to conclude that they were affirmatively refused entry after a ten to twelve second interval without a verbal or physical response." *Id.* at 1031.

In a case quite similar to this, the District of Columbia Circuit held that a 15 to 20 second wait after a single knock and announcement was sufficient, and that a second knock was not required. *United States v. Spriggs*, 996 F.2d 320 (D.C. Cir. 1993).

> Clearly the agents did not act unreasonably in entering the apartment after knocking and announcing themselves only a single time. . . . One need seek admittance only once in order to be refused. . . . With respect to the delay before entering, under our case law the agents were justified in concluding that

> they had been constructively refused admittance when the occupants failed to respond within 15 seconds of their announcement.

Id. at 322-23. On the other hand, in *United States v. Phelps*, 490 F.2d 644, 646 (9th Cir. 1974), in upholding a forced entry, we gave weight to the fact that agents had knocked and announced twice, waiting 5 to 10 seconds after each before forcing entry. But, noting the circumstance-specific nature of the inquiry, *Phelps* emphasized that "it matters not that the record reveals ten, fifteen, or twenty seconds, for the true rule rejects time alone, even 'an exceedingly short time,' such as ten seconds, as the decisive factor." *Id.* at 647 (citing *Jackson v. United States*, 354 F.2d 980 (1st Cir. 1965)); *see also United States v. Ramos*, 923 F.2d 1346, 1355-56 (9th Cir. 1991), *overruled on other grounds by United States v. Ruiz*, 257 F.3d 1030 (9th Cir. 2001) (en banc) (upholding entry after two knocks and announcements followed by 45 second delay). Thus, I do not read *Phelps* as *requiring* a second knock here, although—given the circumstances—that might have been a more effective way to assure that Banks heard the demand for entry and had an opportunity to respond.

I do not know what the majority makes of *Phelps* or *Spriggs*, because they are not discussed. Indeed, the majority neglects most of the authority I discuss above. Such authority at the very least provides guidance for determining the reasonableness of the 15 to 20 second wait considering the specific circumstances of Banks' situation—he resided in a small apartment, there was a loud knock and announcement, he was suspected of possessing illegal narcotics and the warrant was executed in the middle of the day. On these facts, I believe it was not unreasonable for the officers to conclude that Banks

had heard and constructively denied their request for entry. Accordingly, I respectfully dissent from Part I of the majority opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

CR-S-98-269-JBR (RLH)

UNITED STATES OF AMERICA, PLAINTIFF

v.

LASHAWN LOWELL BANKS, DEFENDANT

[Received: Apr. 20, 2000]

ORDER

This matter is before the Court on Defendant's Objections to the Report and Recommendation of United States Magistrate Judge (#55).

Background

Defendant is charged with Possession of a Controlled Substance with Intent to Distribute and Drug User in Possession of Firearm. These charges were brought as a result of a search of Defendant's residence where the drugs and firearm were found. Defendant brought a motion to suppress the evidence on the bases that 1) the police officers violated the "knock and announce" requirement pursuant to the Fourth Amendment and 18 U.S.C. § 3109; 2) Defendant's confession was involuntary; and 3) Defendant's *Miranda* waiver was not knowing and intelligent.

Following an evidentiary hearing, the magistrate judge found that Defendant's failure to answer the officer's knock and announcement justified the forced entry after fifteen to twenty seconds. The magistrate judge also found that despite Defendant's professed intoxication, his actions were consistent with an ability to make reasoned decisions. Finally, the magistrate judge found that Defendant had not unequivocally invoked his right to counsel.

The Court has conducted a *de novo* review of the record in this case in accordance with 28 U.S.C. § 636(b)(1)(B) and (C) and Local Rule IB 3-2 and determines that the Report and Recommendation of the magistrate judge should be adopted.

IT IS THEREFORE **ORDERED** that the magistrate judge's Report and Recommendation (#53) entered March 9, 2000, is ADOPTED.

IT IS FURTHER **ORDERED** that Defendant Lashawn Lowell Banks' Motion to Suppress (#48) is DENIED.

DATED this 18th day of April 2000.

/s/ JOHNNIE B. RAWLINSON
JOHNNIE B. RAWLINSON
United States District
Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

CR-S-98-269-JBR (RLH)

UNITED STATES OF AMERICA, PLAINTIFF

v.

LASHAWN LOWELL BANKS, DEFENDANT

REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

(Motion to Suppress Evidence–#48)

Before the Court is LaShawn Lowell Banks' **Motion to Suppress (Evidentiary Hearing Requested)** (#48, filed December 23, 1999). The United States opposed the motion in the Government's Response to Defendant's Motion to Suppress (#50, filed January 6, 2000). An evidentiary hearing was conducted on March 6, 2000.

INTRODUCTION

Defendant LaShawn Lowell Banks in charged with one court of possession of a controlled substance with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and one count of possession of a firearm as an unlawful drug user in violation of 18 U.S.C. § 922(g)(3). A search warrant was issued on July 14, 1998, authorizing law

enforcement officers to search the Defendant's property, and law enforcement officers of the Las Vegas Metropolitan Police Department entered the Defendant's home at 1404 Henry Drive, Apartment D, Las Vegas, Nevada, on July 15, 1998. Defendant brings this motion to suppress statement made by him in response to questioning by law enforcement officers after he was read the Miranda warnings.

Defendant's Motion Suppress (#48) advocates that the search conducted by the law enforcement officers violated his constitutional rights and that any statements elicited by the officers should be suppressed as "fruit of the poisonous tree." Defendant contends that any statements made by him to the officers were involuntary and should be suppressed.

Defendant's brief begins with a discussion of various facts regarding the search warrant and the entry of the Defendant's home. The brief then sets forth the language of the Fourth Amendment and mentions facts attested to by the attesting officer in the search warrant. Following this introduction, the Defendant notes that the Fourth Amendment and 18 U.S.C. § 3109 require officers conducting searches pursuant to a search warrant to "knock and announce" before they are allowed to forcibly enter a search location. Defendant then claims he never heard the officers "knock and announce" and that "[b]ecause the requirements of the 'announcement' of Title 18 U.S.C. § 3109 were not met, fruits of the search, drugs, firearms and confession, must be suppressed as 'fruit of the poisonous tree.'" (Def.'s Mot. to Suppress (#48) at 6, lines 14-16.) The Defendant cites, *inter alia*, *Ker v. California*, 374 U.S. 23 (1963), *Sabbath v. United States*, 391 U.S. 585 (1968),

and *Wong Sun v. United States*, 371 U.S. 471 (1963), in support of this argument.

The Defendant's final argument contends that his confession must be suppressed as violation of his Fourth and Fifth Amendment rights. He claims that the confession was not voluntary because he was "highly intoxicated" when he was interrogated by the officers. He reminds that Court to consider the totality of the circumstances, including the history, education, and physical condition of the Defendant. He cites *Crane v. Kentuky*, 476 U.S. 683 (1986), and *Mincey v. Arizona*, 437 U.S. (1978), in support of this argument.

The Government's response sets forth its version of the facts, and then argues that the officers who entered the Defendant's home did not violate 18 U.S.C. § 3109, citing *United States v. Lockett*, 919 F.2d 585 (9th Cir. 1990), *United States v. Zermeno*, 66 F.3d 1058 (9th Cir. 1995), and *United States v. Mendonsa*, 989 F.2d 366 (9th Cir. 1993). The Government provides the language of 18 U.S.C. § 3109, and it then indicates that the amount of time an officer must wait before making a forcibly entry after knocking and announcing depends on the circumstances of each case, citing *United States v. McConney*, 728 F.2d 1195 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984). The Government claims that the officers waited for sufficient amount of time before making their forced entry.

The Government contends that the Defendant's confession was voluntary. It argues that even if the Defendant was intoxicated, his confession was still rational and not against his free will. The Government represents that the Defendant's confession was voluntary because he had the presence of mind to answer some question but not others. The Government refers

the Court to *Modeiros v. Shimoda*, 889 F.2d 819 (9th Cir. 1989), and *United States v. Kelly*, 953 F.2d 562 (9th Cir. 1992(in support of this argument.

Finally, the Government proposes that the Defendant knowingly, intelligently, and voluntarily signed the waiver of rights form, citing *United States v. Andaverde*, 64 F.3d 1305 (9th Cir. 1995). The Government reminds the Court that it must consider the totality of the circumstances, citing *Terrovona v. Kinchloe*, 912 F.2d 1176 (9th Cir. 1990). The Government also refers the Court to *United States v. George*, 987 F.2d 1428 (9th Cir. 1993), and *United States v. Martin*, 781 F.2d 671 (9th Cir. 1985), in representing that although an individual may be under the influence, a confession may still be voluntary. The Government also contends that coercive police activity is necessary for a confession to be involuntary, briefly discusses *Colorado v. Connelly*, 479 U.S. 157 (1986), and argues that the Defendant in this case was not coerced.

SUMMARY OF FACT AND PROCEDURE

At the evidentiary hearing, the Government called two witnesses: Officer Wilson Crespo and Officer Richard Tomaso. The Defendant also took the stand and testified on his own behalf. The testimony offered by these witnessess is summarized as follows:

After obtaining a search warrant authorizing a search of the Defendant's residence, officers of the North Las Vegas Police Department and the Federal Drug Task Force arrived at the home of the Defendant at approximately 2 p.m. on July 15, 1998 to execute the search warrant. Some officers were dressed in SWAT gear, while others were in street clothes. Officer Crespo testified that the officers knocked "loudly" on

the Defendant's door and "authoritatively" announced they were police officers. The officers heard no response from inside the apartment. They proceeded to wait according to Officer Crespo, "at least fifteen seconds," and according to Officer Tomaso, twenty seconds. The officers which comprised the entry team then made a forced entry into the apartment using a battering ram of some sort. The Defendant testified that he was in the shower when he heard a "boom," and indicated that he thought someone "shot the door open."

Upon entering the apartment, the officers, some of which were dressed in black, hooded SWAT team uniforms with masks, repeatedly identified themselves as police officers while they secured the apartment. The Defendant was found in the hallway area, wet, naked, and covered with soap. The Defendant declared that he never hear [*sic*] the "knock and announce" and that he came out the bathroom when he heard the "boom." At least one officer drew his weapon, and at least one officer yelled, "police" and ordered the Defendant to lie on the ground which he did. An officer then placed his knee and weight into the Defendant's back. The Defendant was then placed under arrest, handcuffed, and taken to the kitchen area of the apartment. According to Officer Crespo, the Defendant was given something to cover himself with immediately.[1]

The Defendant was advised of his constitutional rights. Officer Tomaso advised the Defendant of his rights orally, and the Defendant was also given a document which listed his constitutional rights. Officer

[1] Officer Tomaso testified that the Defendant was given a towel, and the Defendant testified he was given some underwear.

Tomaso stated that the Defendant was asked if he wished to waive his constitutional rights. The Defendant testified that he was given the Miranda warnings orally, and that he remembered being presented with the advice of rights form, but he did not recall reading or discussing the advice of the rights form. However, Officer Tomaso testified that he witnessed the Defendant's sign the waiver of rights form, entered as an exhibit, is signed with the Defendant's name. Tomaso also testified that the Defendant indicated that he would like to cooperate with the officers and that the Defendant states he would be willing to answer some questions but not others. Furthermore, according to Officer Tomaso, although the Defendant asserted that he wanted to consult a lawyer before accepting a "deal," he indicated after further inquiry that he was willing to discuss his own culpability and did not ask for an attorney for questioning. On direct examination the Defendant stated that he told the officers he wished to talk to an attorney before continuing with the interview. On cross-examination, however, the Defendant indicated that he wanted to talk to an attorney before he responded regarding his suppliers, but that he was willing to answer other questions, particularly regarding his family and the possibility of a search of his mother's house, without consulting an attorney. The Defendant also testified that he asked the officers if he could contact a girlfriend to watch his apartment while he left with the officers, and he was allowed to do so.

Officer Crespo and Officer Tomaso testified that the Defendant was able to understand, respond to, and answer questions. Officer Crespo also indicated that the Defendant spoke well, his speech was not slurred, nor were his eyes red or droopy. Officer Crespo stated

that the officers had no reason to believe the Defendant was under the influence of any substances, thus a breathalyzer or other sobriety test was not administered. The Defendant, on the other hand, implied that he was drunk by testifying that he had been "drinking, snorting cocaine and smoking weed" all night and all morning. The Defendant also testified that he was able to shower without any problem.

The officers also explained why they did not tape record the interview of the Defendant, indicating that it was for the Defendant's personal safety in case he "gave up" others involved in criminal activities, such as his drug supplier, and that it was the policy of the FBI to not tape record such interviews or interrogations.

DISCUSSION

The Court is confronted with three issues: whether the knock and announce procedures and entry into the Defendant's apartment by the officers were appropriate, whether the Defendant knowingly and intelligently waived his Fifth Amendment rights despite his alleged intoxication, and whether the Defendant invoked the right to counsel while being questioned by the officers.

First, this Court concludes that the officers complied with the knock and announce requirement of 18 U.S.C. § 3109, and that the officers did not violate the Defendant's constitutional rights when they entered the Defendant's apartment. The knock and announce rule states as follows:

> The officers may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

18 U.S.C. § 3109. In sum, the statute requires law enforcement officers to notify the occupants of a dwelling of the officer's purpose and authority before he may enter to execute a search warrant, and the officer must be denied access before he may forcibly enter the house. "A failure to answer a knock and announce has long been equated with a refusal to admit the search party and a justification for forcible entry. (Citation omitted)." *United States v. Ramos*, 923 F.2d 1346, 1356 (9th Cir. 1991). The Ninth Circuit, after reviewing whether an officer must wait for a specified period of time before he is deemed to have been refused admittance and may make a forced entry, stated, "There are no set rules as to the time an officer must wait before using force to enter a house; the answer will depend on the circumstances of each case." *United States v. Phelps*, 490 F.2d 644 (1974), *cert. denied*, 419 U.S. 836 (1974) (quoting *McClure v. United States*, 332 F.2d 19, 22 (9th Cir. 1964). The Ninth Circuit has upheld the validity of searches where the delay was ten seconds or less. *Phelps*, 490 F.2d at 647 (finding that after hearing movement inside the residence followed by a wait of five to ten seconds justified forcible entry); *United States v. Allende*, 486 F.2d 1351, 1353 (9th Cir. 1973) (finding that a forcible entry after hearing scampering sounds and waiting ten seconds was justified). Here, the officers complied with the knock and announce statute. They knocked loudly on the Defendant's door, authoritatively announced they were police officerd, and waited for fifteen to twenty seconds. Fifteen to twenty seconds is a reasonable amount of time for an occupant to respond to an announcement.

Moreover, considering the circumstances surrounding the search, that the warrant authorized a search of the premises for property including cocaine, and, in particular, the lack of response from within the apartment, fifteen to twenty seconds was a sufficient waiting period before entering the apartment by force.

Second, the Court is convinced that the Defendant knowingly and intelligently waived his constitutional rights. "Under both the fifth and sixth amendments, waiver must be voluntary and a knowing and intelligent relinquishment of a known right or privilege." *Norman v. Ducharme*, 871 F.2d 1483, 1486 (9th Cir. 1989) (citing *Brewer v. Williams*, 430 U.S. 387, 404 (1977)). The Government cited Ninth Circuit language regarding the voluntariness of a confession as it relates to intoxication; the language reads, "A confession is voluntary if it is "'the product of a rational intellect and free will' . . . whether [or not] a confession is the product of physical intimidation or psychological pressure [or] a drug- [alcohol] induced statement. (Citations omitted)." *Modeiros v. Shimoda*, 889 F.2d 819, 823 (9th Cir. 1989) (brackets and ellipsis in original). While the Court acknowedges that intoxicating substances may impair an individual's senses, a decision to waive one's rights or confess is voluntary if it is the product of a rational intellect and free will, regardless of whether the decision is made while under the influence. Here, the Defendant claims he lacked the rational intellect and free will to knowingly and intelligently waive his constitutional rights because he was under the influence of cocaine, marijuana, and alcohol. His actions, however, are contrary to this statement. The Defendant's actions indicate that he was capable of making reasoned decisions. The officers testified that the Defendant was

able to speak clearly, follow instructions, and carry on a conversation. Furthermore, the Defendant's own testimony indicates that he knowingly called a girlfriend to watch his apartment while he left with the police officers–a reasoned decision, and he consciously reasoned with the officers regarding his desire to speak with a lawyer before he agreed to "give up" the identity of his suppliers. The Court finds that the Defendant was not so intoxicated that this rational intellect and free will was inhibited and that any statements made by the Defendant were knowing and voluntary. The Defendant was informed both orally and in writing of his constitutional rights, and he knowingly and intelligently waived those rights. As a result, any statements made by the Defendant to the officers should not be suppressed.

Finally, the Court is not persuaded that the Defendant invoked his right to counsel while being questioned by the officers. The fifth amendment right to counsel applies during custodial interrogation, *Miranda v. Arizona*, 384 U.S. 436 (1966), and if a suspect indicates in any manner that he wishes to consult with an attorney before speaking, there can be no further questioning. *Id* at 474. The Ninth Circuit, however, in interpreting *Miranda*, held that police may clarify an ambiguous or equivocal request for an attorney made by a suspect. *United States v. Fouche*, 833 F.2d 1284 (9th Cir. 1985), cert. denied, 486 U.S. 1017 (1988) (finding that a police initiated conversation after an equivocal request for an attorney does not automatically void a subsequent confession if the police questions are fairly designed to clarify the ambiguity). Moreover, "a defendant may selectively waive his Miranda rights, deciding 'to respond to some questions but not others,'" *Bruni v.*

Lewis, 847 F.2d 561, 564 (9th Cir. 1988), *cert. denied*, 488 U.S. 960 (1988), and mere mention of an attorney does not suffice to render a statement as an equivocal request for counsel, as the word attorney is not "talismanic." *Id.* at 564. The Defendant did mention he wished to speak to an attorney. Rather, according to Officer Tomaso, the Defendant indicated that he was willing to answer some questions but not others. Moreover, the Defendant's request to speak with an attorney before agreeing to a plea bargain was not a clear request invoking the Fifth Amendment right to counsel. Consequently, the officers made further inquiry, and this inquiry, according to both Officer Tomaso and the Defendant himself, indicated that although the Defendant wanted to consult with an attorney before accepting a "deal," he was still willing to discuss other matters with the officers and respond to questions not relating to a plea bargain. Accordingly, the Court finds that the Defendant did not invoke his right to counsel, and even if he had invoked the right, his willingness to answer other questions constituted a waiver of the right.

RECOMMENDATION

Based on the foregoing, it is the recommendation of the undersigned United States Magistrate Judge for the District of Nevada that Defendant LaShawn Lowell Banks's **Motion to Suppress** (#48) be **denied.**

Dated March 9, 2000.

/s/ ROGER L. HUNT
ROGER L. HUNT
United States Magistrate Judge

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-10439
DC No. CR-9800269-JBR

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

LASHAWN LOWELL BANKS, DEFENDANT-APPELLANT

Before: POLITZ,* W. FLETCHER, and FISHER, Circuit Judges.

Judges Politz and W. Fletcher have voted to deny the petition for rehearing, and Judge Fisher has voted to grant the petition for rehearing.

Judges W. Fletcher and Fisher have voted to deny the petition for rehearing en banc; and Judge Politz so recommends.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc.

Fed. R. App. P. 35.

* Honorable Henry A. Politz, Senior United States Circuit Judge for the Fifth Circuit Court of Appeals, sitting by designation.

The petition for rehearing and the petition for rehearing en banc, filed April 19, 2002, are **DENIED.**